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U.S. Citizenship
and Immigration
Services

D2

FILE: WAC 03 185 52795 Office: CALIFORNIA SERVICE CENTER Date: JAN 03 2005

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a Japanese manufacturer of semi-conductor equipment and systems, with a California office that markets its equipment to laboratories, factories, and offices in the United States. It seeks to hire the beneficiary as public relations manager. The director denied the petition based on his determination that the proffered position was not a specialty occupation and that the beneficiary was not qualified to perform the duties of a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with a brief and additional documentation. The AAO reviewed the record in its entirety before reaching its decision.

The initial issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

On appeal, counsel states that the petitioner is seeking the beneficiary's services as a manager of public relations to head a new public relations section at its California branch office. Counsel notes that the title previously assigned to the position by the petitioner at the time of filing and in response to the director's request for evidence -- manager for marketing and public relations -- was "erroneously used," as the proffered position does not have marketing responsibilities. He asks that the proffered position be considered under its amended title and duties.

However, on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). As a result, neither the amended title given the proffered position by the petitioner, nor the beneficiary's management of a new public relations unit will be considered by the AAO. This proceeding will, instead, rely upon the record, as it existed at the time the director made his determination.

At the time it responded to the director's request for evidence, the petitioner stated that a manager of marketing and public relations would:

- Participate in trade shows in San Jose, San Francisco or in other parts of the United States, with responsibility for locating area for display, negotiating for rental space, arranging transportation of equipment and systems, overseeing the publication of photographs, pamphlets and brochures, answering questions, preparing interviews of company executives, preparing lights, microphones, tape recording equipments, and preparing purchase order forms (100% of the manager's time when on duty);
- Meet with the national sales manager in the eastern part of the United States to discuss strategy for marketing equipment and systems (30% of the manager's time);
- Assemble, discuss and prepare copy, layout of script, photographs, cut-outs of inside of equipment systems for pamphlets, brochures and leaflets (40% of the manager's time);

- Travel to meet with prospective vendors to plan features of equipment and systems, and interpret for vendors and engineers from Japan (20% of the manager's time);
- Arrange interviews with trade journals, and publications in the high-tech semi-conductor market for timely articles regarding new generations of equipment and systems (10% of the manager's time); and
- Work with managers, engineers, technicians to develop an effective marketing strategy for increased sales in the United States and in Europe, proposing attractive and effective marketing techniques including pamphlets and leaflets targeting new European markets such as France and Italy and interviews with editors and trade publications in these countries (100% of the manager's time when in Europe).

However, the record before the AAO shows that prior to providing this statement of duties to the director, the petitioner offered other descriptions of its position that are at odds with that just discussed. In its Labor Condition Application (LCA), submitted at the time of filing, the petitioner stated that the title of its proffered position was that of "administrator public relations." In the Prevailing Wage Request Form it submitted to the State of California, the petitioner described the position as that of an administrative assistant to the national sales manager and stated that the duties of the position consisted of the following:

- Serves as liaison between east coast and west coast regional offices;
- Coordinates national sales manager travel, hotel accommodations;
- Makes appointments for presentation of corporate products to vendors;
- Translates corporate promotional materials and pamphlets from Japanese into English;
- Arranges interview on television and news media; and
- Interprets Chinese or Japanese into English as necessary.

In light of the petitioner's inconsistent statements regarding its position, the AAO has reviewed the record to determine whether these inconsistencies have been identified and addressed by the petitioner or counsel. It is incumbent upon the petitioner to resolve any inconsistencies in the record with independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the instant case, however, the AAO has found nothing to explain the discrepancies in the petitioner's statements regarding its position.

As these inconsistencies have not been resolved, the record's varying descriptions of the proffered position's title and duties -- including counsel's statement on appeal that the title and duties of the position had been previously misstated -- call into question the job description provided by the petitioner at the time of filing and in response to the director's request for evidence. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*. Therefore, based on the concerns created by the inconsistent descriptions of the

proffered position, the AAO concludes that the job duties listed by the petitioner in response to the director's request for evidence cannot serve as a reliable description of the proffered position.

As the AAO cannot rely on the petitioner's description of its position, it has no evidence regarding the proffered position on which to base its analysis of whether it qualifies as a specialty occupation per the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A). It, therefore, concurs with the director's decision that the petitioner has failed to meet its burden of proof in establishing that its proffered position qualifies as a specialty occupation. This decision is reached on grounds other than those relied upon by the director. The AAO, however, reviews appeals on a *de novo* basis and has the authority to deny petitions that fail to comply with the technical requirements of the law, even if the basis for the AAO's denial was not identified in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO now turns to the issue of whether the beneficiary qualifies to perform the duties of the proffered position had it been found to qualify as a specialty occupation.

In determining whether an alien is qualified to perform the duties of a specialty occupation, CIS looks to the petitioner to establish that the beneficiary meets one of the requirements set forth at Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) -- full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Further discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 214.2(h)(4)(iii)(C), and requires the individual to:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Although the petitioner has submitted documentation to establish that the beneficiary is qualified to perform the duties of its proffered position under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(C)(1), the AAO, as a

result of the unresolved inconsistencies regarding the petitioner's position, lacks a reliable description of the position's duties against which to analyze the beneficiary's qualifications. Therefore, the AAO finds that not only has the petitioner failed to establish that its proffered position is a specialty occupation, but that the beneficiary is qualified to perform the duties of that position.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) and that the beneficiary is qualified to perform the duties of a specialty occupation per 8 C.F.R. § 214.2(h)(4)(iii)(C). Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO notes that, at the time of filing, the petitioner submitted an incomplete Form I-129, failing to specify in Part 5 the dates of employment for its proffered position. The nonimmigrant classification of H-1B, as discussed at section 101(a)(H)(i)(b) of the Act, applies to aliens who are coming temporarily to the United States to perform services in a specialty occupation. The petitioner's failure to provide the dates of the beneficiary's employment undermines both its ability to establish that it is seeking the services of the beneficiary for a temporary period of time and that it intends to comply with the period of employment authorized by its certified LCA. In light of this omission, the AAO finds that the petitioner has failed to establish that it is seeking to bring the beneficiary temporarily to the United States. For this additional reason, the petition will be denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.